No. 12046.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

OPENING BRIEF OF LEE ARENAS.

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Statement of Jurisdiction.

This is an appeal from a judgment of the United States District Court, Southern District of California, Central Division, entered in an equitable proceeding founded upon United States Code Title 25, Section 345, and the jurisdiction of this Court upon appeal is conferred by United States Code Title 28, Section 225(a).

Statement of the Case.

As stated in the opinion of the Court below this is an equitable proceeding under Section 345 of Title 25 of the United States Code, upon the petition of the appellees for an award of attorneys' fees and costs.

The appellees all acted as counsel for the appellant Lee Arenas in connection with his claim to certain land in Palm Springs, California, but were in the litigation for different periods of time. The appellee David D. Sallee was named as attorney for appellant Arenas as evidenced by a written contract of employment dated November 20, 1940. [Tr. p. 118; Pet. Ex. 6, Tr. p. 173.]

Under the provisions of this contract appellee Sallee was to receive 10% of the value of land obtained and was bound to pursue the litigation in question to and through the court of final resort. [Tr. p. 176.] He was authorized to associate with him such assistants, including attorneys, as he desired. [Tr. p. 176.]

There is some difference between the testimony of appellee Sallee and appellee Clark as to where the November 20, 1940, agreement was signed by appellant Arenas, or whether in fact two different agreements were signed [Tr. p. 145], but appellee Clark apparently was in the litigation from its inception as an associate of appellee Sallee. [Tr. p. 142.] The appellee Preston entered the litigation as counsel in September of 1943 at the request of appellee Clark. [Tr. p. 157.] About 18 months after appellee Preston entered the litigation another contract of employment was signed by appellant and all of appellees providing for compensation upon *quantum meruit* basis. [Pet. Ex. No. 7, Tr. p. 187.]

After Judge Preston's association the litigation was pressed through a hearing on the legal question in the United States Supreme Court in which appellees were successful; a trial on the merits in the United States District Court and an appeal from the judgment there obtained by appellees in the United States Court of Appeals for the Ninth Circuit where the judgment obtained by appellees below was affirmed in part, and reversed in part, which in effect allotted to appellant Arenas one-half of the land he claimed. Thereafter certiorari was denied and the present suit for attorney's fees and costs was instituted.

The Court below awarded to appellees Clark and Sallee 10% of the value of the lands allotted to Arenas. A further and additional award was made by the Court to appellee Preston of 12½% of the value of the said lands. The lands involved were valued at $211,500.00 by one appraiser and at $1,047,000.00 by another.

Specification of Errors.

1. THE COURT'S FINDING THAT ATTORNEYS' CONTRACT ENTERED INTO ON NOVEMBER 20TH, 1940, HAD BEEN SUPERSEDED AND RESCINDED IS NOT SUPPORTED BY THE EVIDENCE, AND HENCE THE COURT ERRED IN FAILING TO LIMIT THE ATTORNEYS' FEES AWARDED TO ALL COUNSEL TO A TOTAL OF TEN (10%) PER CENT.

2. ASSUMING FOR ARGUMENT'S SAKE THAT THE ATTORNEYS' CONTRACT OF NOVEMBER 20TH, 1940, HAD BEEN RESCINDED, THE COURT'S FINDING THAT APPELLEE PRESTON WAS ENTITLED TO A FEE OF TWELVE AND ONE-HALF (12½%) PER CENT OF THE VALUE OF THE LAND IS NOT SUPPORTED BY THE EVIDENCE. THE TRIAL COURT ERRED IN AWARDING AN EXCESSIVE FEE TO APPELLEE PRESTON.

The Evidence.

We quote here that portion of the evidence we believe to be essential in the determination of the issues:

Evidence bearing upon Specification of Error No. 1:

The contract of employment of November, 1940, limiting compensation of counsel to 10% was never rescinded or superseded. The appellee Sallee testified as follows:

> "Q. You have shown me the original of a document which bears the date of November 20, 1940, which recites that it is an agreement between Lee Arenas and David D. Sallee. Now, was that document executed in more than one original? A. Yes; two.
>
> Q. Were both signed and acknowledged in the form in which you have submitted a copy to me? A. Yes.
>
> Q. Were you present, Mr. Sallee, when Lee Arenas affixed his signature to that document—when he signed both originals? A. Yes, in the court room of Judge McCormick, before Judge Paul J. McCormick.
>
> Q. Lee Arenas was there? A. Yes, and on the stand for about two hours." [Tr. p. 118.]

> Q. Who prepared the document called the 'agreement'? A. I prepared the rough outline, then Oliver Clark and I went over it together, and he detailed it, and it was probably edited three or four times before its final form.
>
> Q. Was it ultimately drafted in your office and under your supervision? A. Yes.
>
> Q. Was it discussed with Mr. Arenas before you went with it to Judge McCormick? A. Yes.
>
> Q. Where? A. I don't remember. The first conference was out at his home under a tree, with Mr. Clark and me. We called on him, or in my of-

fice, I don't just remember, we had two or three conferences over the matter. Mr. Clark was in on a couple or three of them, and a couple of them I went over the outline with him myself, explaining it in detail.

Q. Was Mr. Clark present when these conversations took place? A. Two or three of them, yes." [Tr. p. 122.]

"Q. Did you or did you not tell him (Lee Arenas) that the agreement would not be effective until it was approved by the Commissioner of Indian Affairs or until it was approved by the Secretary of the Interior? A. I told him I would send the contract in to be approved, which I did after the Court had approved it here.

Q. Yes, Mr. Sallee, but did you tell him that it would not become effective until approved by the Commissioner of Indian Affairs or the Secretary of the Interior? A. *I didn't tell him, because in my opinion it was effective all the way through.*" [Tr. p. 123.]

"Q. Have you made any assignment orally or in writing of your interest in this agreement to anyone? A. Just my associates, that I would give them an interest in it.

Q. That was in writing? A. No, I walked off and forgot it, I had three copies made.

Q. When were the assignments made? A. When Judge Preston came into the case, I forget the date, Mr. Clark dictated the assignment.

Q. They were in writing and signed by you and delivered to Mr. Clark and Judge Preston? A. They were put in a file that Mr. Clark and I had, and not to Judge Preston, because Oliver said he had them at one time, he put them in that file." [Tr. p. 136.]

TESTIMONY OF OLIVER O. CLARK:

"Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940? A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case? A. Yes.

Q. At the time you commenced these conversations with Mr. Arenas looking toward a modification of the agreement of November 20, 1940, had you helped perform any legal services as counsel for Mr. Arenas in this case? A. Yes. I had begun the suit and carried it through the Circuit Court and to the point where the petition for certiorari was required to be filed before I discussed with Lee the modification of the original contract." [Pet. Ex. No. 4.]

"Q. Did you suggest to Lee Arenas that he obtain or seek or get the advice of any independent counsel before he modify the agreement?" [Tr. pp. 150-151.]

"Q. Did you tell Mr. Arenas, as a part of your conversation leading up to the signing of the documents dated February 1, 1945, that it was necessary for him to sign an agreement of that kind before further proceedings could be had in his case? A. No. Our relations were such that if Lee Arenas told me to go ahead on the basis of our oral understanding, it was just as good as if it was in writing, and the fact that that contract wasn't signed until after we had gone through the United States Supreme Court and had come back here for the trial of the case—

Q. Did you tell Mr. Lee Arenas in any of the conversations following the effective date of November 20, 1940, and prior to February 1, 1945, that you

could go no further with his case after the Circuit Court of Appeals had affirmed the summary judgment unless he would execute an agreement covering a larger fee? A. No.

Q. What did you tell him in that respect? A. I told him I thought it was advisable that Judge Preston be associated in the case, but that if he did not agree to it I would go to Washington and become admitted to the Supreme Court and file the petition while I was there, because I at all times had in mind that if Judge Preston would not become associated I would go ahead with the litigation through the Supreme Court.

Q. Did you contemplate that if you had gone through with the litigation to the Supreme Court and had obtained a reversal of the Circuit Court opinion that you would conduct further proceedings in whatever courts might be required until the trust patent was obtained? A. I did. In other words, I assume you want to know if I at any time suggested to Arenas that if I and Dave would go ahead without any additional lawyer, we would expect any compensation in addition to what our original contract provided for. No, I never had that in mind. I never suggested it to Arenas and the only reason the new contract for compensation was made was because of the additional services that we were able to obtain from Judge Preston being in the case." [Tr. pp. 152-153.]

Testimony of John W. Preston:

"Q. At the time that you started in that employment in 1943, you were informed of the provisions of the document dated November 20, 1940? A. Well, I have a reasonably good memory that I knew something about it—that they had a contract, and for

ten per cent, and that I didn't think it was enough, I remember that.

Q. Do you recall whether you personally told Lee Arenas that you didn't think it was enough before you started in on your employment? A. I didn't do that.

Q. I have in mind the document dated February 1, 1945, was after you had performed substantial portions of your services? A. You are right. I don't think I had any personal talk with Lee Arenas or that I informed him of anything.

Q. Whatever information he had came through others? A. Yes; that's right." [Tr. pp. 157, 158.]

"Q. Had you ever suggested to Mr. Arenas, Judge Preston, that he seek independent advice before he modified his contract of November 20, 1940, and prior to the time when he signed the documents dated February 1, 1945? A. I had no direct communication with Mr. Arenas on that.

Q. You had talked to him on other matters in the case, because you tried the case before that date, didn't you? A. I was at Mr. Arenas' house in Palm Springs once, and I examined Mr. Arenas as a witness at the time of the trial. I had a few talks with him in the corridor of the court room, and I don't remember ever talking to him any other time.

Q. I assume you talked to him before you put him on the stand? A. That's my custom to talk to a witness first, but I swear I don't remember talking to him.

Q. I wasn't present at the trial. Judge Preston, you have had broad experience both on the bench and as an attorney—now, having in mind Mr. Sallee's previous statements and Mr. Clark's previous statements as to what they told Mr. Arenas, is it your

opinion that Mr. Arenas was sufficiently informed of English and sufficiently educated to understand and comprehend the information and advice which he was being given? A. I certainly think he was competent at that time to transact business—as competent as the ordinary individual of the White Race. He showed on the witness stand intelligence that was very noticeable—he was commended by the Judge as being an intelligent witness—and if you will recall, the contract is simply a *quantum meruit* to be fixed by the court. It doesn't require a great deal of advice to make such a contract, and I think also it is valid under the law." [Tr. pp. 160, 161.]

Testimony of Lee Arenas:

"Q. By Mr. Taheny: Mr. Arenas, I now show you a document purporting to be a document or agreement signed (292) on November 20, 1940, between you and David D. Sallee. A. Yes; I did.

Q. Do you recall signing that contract I am showing you? What purports to be your signature, is that your signature? A. Yes.

Q. This last contract, which is marked Petitioners' Exhibit No. 6, provides for a fee of 10 per cent. A. Yes, sir.

Q. 10 per cent. A. 10 per cent.

Q. Did you understand at the time you signed that that it was to be for 10 per cent? A. Yes, sir.

Q. Now, at any time thereafter did Mr. Sallee or Mr. Clark or Mr. Preston or anybody else inform you that there was to be a different fee or a higher fee for the work done in this case in your behalf? A. They never say nothing about me—about it to me.

Q. Did Mr. Sallee at any time act as your attorney in another case that was filed against you by the

Government after the present suit was filed? A. Well, I am always depending on him, Mr. Sallee.

Mr. Preston: What is the answer, Mr. Reporter?

(Answer read by the reporter.) (293)

Q. By Mr. Taheny: Mr. Arenas, do you remember being served with some suit papers in a suit brought against you and a number of other Indians? A. Yes.

Q. 10 or 15 Indians? A. Yes.

Q. A suit in ejectment? A. In ejectment, I think.

Q. That was a suit filed about 1943? A. Something like that; yes.

Q. And at that time did Mr. Sallee agree to represent you in connection with that particular suit? A. He took that paper and he was going to defend me, on me, for me." [Tr. pp. 80, 81.]

"Q. By Mr. Taheny: Mr. Arenas, at any time at all were you informed that it will be necessary to associate Judge Preston in this case? A. No; I never know.

Q. Were you at any time informed that it will be necessary for you to pay a higher fee in order that Mr. Clark and Mr. Sallee will get another attorney to work with them on the case? A. Never knew anything about it." [Tr. p. 83.]

Testimony of Marian Therese Arenas, Wife of Lee Arenas:

"Q. Were these documents which are now in evidence as Exhibits 7 and 8 signed at the same time? A. Yes, sir.

Mr. Preston: What was the answer?

(Answer read by the reporter.)

The Witness: Yes.

Q. By Mr. Taheny: And at the time these documents were signed was anything said to you or to Mr. Arenas in your presence to the effect that either of these documents was to apply to the suit that is now involved in this case, that is, the suit of Arenas versus the United States? A. No, sir.

Q. At the time that Mr. Sallee told you that you needed an attorney was there anything said at that time about the necessity of you signing a contract? A. He said I had to have a power of attorney so he could defend me in that suit.

Q. Are you speaking now of the ejectment suit? (311) A. Yes, sir.

Q. And at all times thereafter it was your understanding that these two documents, Exhibits 7 and 8, applied only to the ejectment suit? A. That is right.

Mr. Preston: To which we object upon the ground that her understanding of Lee Arenas' document has nothing to do with it.

The Court: Overruled. The answer may stand.

Q. *By Mr. Taheny: Now, do you know whether or not the other Indians involved in that suit, with the ejectment suit, also signed similar powers of attorney on the same mimeographed form?* A. There are some that did; yes, sir.

Q. And these other Indians had no connection whatever with the suit of Arenas versus the United States which is now pending here? A. No.

The Court: Your answer was 'no'?

The Witness: Yes, sir." [Tr. pp. 94, 95.]

Referring to the *Quantum Meruit* agreement of February 1, 1945 [Pet. Ex. No. 7, Tr. p. 187], Mr. Sallee testified as follows:

"Q. By Mr. Brett: Now, Mr. Sallee, is it not a fact that following the dispatch of the letter which has just been marked as Respondents' Exhibit K, that you and Mr. Oliver O. Clark and Judge Preston, as associates, filed an answer in the ejectment action in Case No. 3184-O'C, which was against Lee Arenas and his wife; and, at the same time, also filed identical answers in the following ejectment (351) suits against other members of the Palm Springs Indian Tribe: 3185, 3187, 3188, 3189, 3190, 3192, 3193, 3196, 3197, 3198, 3199, 3200, and 3201 in this court?

Mr. Preston: Let me see them. Before you answer it, let me look at those, will you? Where are the answers? I do not see any.

Mr. Brett: I verified each one, for your information.

Mr. Preston: *And that is the date of December, 1944.* What is the question? I have forgotten what it is.

The Court: Let us not go over all that. What do you want to know about it?

Mr. Preston: We will stipulate that we filed answers in the cases recited and mentioned by the counsel in the fall of 1944; but we want it understood that we have the right to bring in here the list of cases also filed concerning these allotments at a later date.

The Court: Gentlemen, I can say I will take judicial notice of the records of this court, if you will call them to my attention.

Mr. Brett: That is satisfactory.

The Court: And give me judicial knowledge, I will take notice.

Q. By Mr. Brett: Mr. Sallee, you are familiar with Exhibits 7 and 8, the mimeographed form of agreements which have been offered in this case? (352) A. Yes.

Q. Did you not procure the mimeographing of those agreements? A. I did not. (I did.)

Q. And did you not circulate all of those agreements among all of the members of the Tribe of Palm Springs? A. No.

Mr. Preston: What is the answer? A. No.

Mr. Preston: 'No.'

Q. By Mr. Brett: Did you not circulate those among quite a large number of them? A. Quite a large number and signed them up.

Q. You commenced that circulation of quite a large number in preparation for filing the answers in the ejectment suits, did you not? A. I couldn't tell you the dates on them right now. They speak for themselves when they were signed." [Tr. pp. 100, 101 and 102.]

It is evident that the 10% contract of employment [Pet. Ex. 6, Tr. p. 173] dated November 20, 1940, had been carefully prepared through several drafts by Messrs. Sallee and Clark and that they had every opportunity therein to protect their rights. Judge Preston was also informed as to its terms. It was signed by Lee Arenas in Court after a two-hour session in which it was explained to him by Judge McCormick. He must have understood fully what it meant, and he had the benefit of independent advice from no less a source than a United States District Judge.

On the other hand there is shown great contrast as to the signing of the *Quantum Meruit* Agreement of February, 1945. [Pet. Ex. 7, Tr. p. 187.] Lee Arenas testified he had been told nothing about the need for greater attorneys' fees or a new arrangement for fees. He did know that Judge Preston was helping, but in his own words he was depending on Sallee for everything. [Tr. p. 81.] Mr. Sallee said "in his opinion the 1940 contract was effective all the way through." [Tr. p. 123.] Judge Preston entered the case in September of 1943, yet petitioners admit that no attempt was made to put into effect a new written contract for increased compensation until about 18 months later. It is noteworthy that this later *Quantum Meruit* Agreement was a mimeographed form and as admitted by petitioners, a number of other Palm Springs Indians were signed up on these same mimeographed forms in connection with petitioners representing these Indians in ejectment suits brought by the Government. These suits had no connection with the fees herein sought by petitioners.

The Trial Court erred in finding that the contract of November 20, 1940, was void [Tr. p. 63], since the contract did not deal with tribal land, but land allotted in severalty in 1927 to Lee Arenas and his relatives. This was so held in the judgment of the Court rendered May 14, 1945, which judgment was sustained as to the date of 1927 by the United States Court of Appeals for the Ninth Circuit.

The contract of November 20, 1940, was not superseded or rescinded by the so-called *Quantum Meruit* Agreement of February 1, 1945, which pertained to the ejectment suit. The *petitioner Preston* at no time had any agreement for compensation in the allotment lawsuit with Lee

Arenas, oral or written, *but by his own admission was an associate of Messrs. Sallee and Clark at the latter's request.* [Tr. p. 157.]

The Court erred in not limiting the total award of counsel fees to 10% of the value of the land, the amount specified in the contract of November 20, 1940.

It is not shown by the evidence that the Indian Lee Arenas had been informed fully or that he understood clearly what the petitioners now claim, that he was signing a contract to pay increased compensation when he signed the mimeographed form on February 1, 1945. [Pet. Ex. No. 7, Tr. p. 187.] It is plain from the evidence that Arenas was far short of having the clarity of understanding about the second agreement which the courts require concerning contracts between attorney and client when made after the confidential relationship has arisen. Yet this is the agreement upon which the Court awarded to Judge Preston 12½% of land valued at $1,047,000.00 by the petitioners' appraisers. This being in addition to the 10% awarded to Messrs. Clark and Sallee. This was clearly error, as is shown by the decisions:

> "In Blaike v. Post, 137 App. Div. 648, 122 N. Y. Supp. 292, it appeared that an attorney was employed by the defendant to bring and prosecute a suit to set aside a mortgage, and gave the defendant a receipt for $100 for disbursements, and in it stated that his compensation was to be 25 per cent of the amount recovered. A suit was brought, which was decided adversely to the plaintiff therein. Seven days before the decision in that suit the attorney procured the defendant to write him a letter, stating that he should receive, as full compensation for legal services, 10 per cent of the amount the defendant should net from

> the sale of the land in controversy, after paying the mortgages thereon and the advances made to him by different persons named. It was also stated that the agreement was to take the place and be in lieu of all other agreements. The action to recover for legal services was based on the subsequent agreement. The court said: 'The learned trial justice charged the jury that the plaintiff could not recover without proof "—that the agreement was fair, that the client acted freely and understandingly, that the client who executed the instrument fully understood its purport, and that it was made by him with full knowledge of all the material circumstances known to the attorney, and was in every respect free from fraud on the part of the attorney or misconception on the part of the client, and that a proper use was made by the attorney of the confidence reposed in him." That charge was undoubtedly correct. It is unnecessary to cite authority to support it, because at all events it is the law of this case on this appeal.'" (19 A. L. R., pp. 857, 858.)

There is some evidence offered by petitioners concerning the added value of Judge Preston as *associate counsel.*

This may be another method short of recision of the November 20, 1940, agreement, the only true contract of employment whereby petitioners might seek to justify extraordinary fees, or additional compensation. It is well settled however, that an attorney may not retain associate counsel at an increased cost to the client. This point and the limitation on the associated counsel's right to recover from the client are well covered in the leading case of *Porter v. Elizalde,* 125 Cal. 204, 57 Pac. 899. The facts here were: That an attorney Crittenden had rendered services to the appellant Elizalde in a contest of her hus-

band's will. Crittenden was brought into the litigation by Mrs. Elizalde's attorneys, Messrs. Graves and Boyce. Crittenden was introduced to Mrs. Elizalde and then interviewed her before and during the trial several times; discussed the case with her as to testimony and witnesses, *and Mr. Crittenden tried the case.*

Sometime later Crittenden's assignee sued Mrs. Elizalde for attorney's fees and recovered in the Court below. Upon appeal the Supreme Court reversed the judgment.

The Court's opinion in part is:

> "The respondent contends, however, that the appellant is liable for the value of the services rendered by reason of having accepted them without objection; that as she was present at the trial and made no objection to having Mr. Crittenden act in her behalf therein, she is under an implied obligation to pay their value. It is undoubtedly in general the rule that when one knows that another is rendering him services, and tacitly assents thereto, if nothing more appears the law will imply a provision on his part to pay for such services. The rule is not uniform or absolute, however, but will be recognized or refused according to the circumstances of the particular case in which it is invoked (see Moulin v. Columbet, 22 Cal. 508), and when it appears that the services were rendered under an express employment by an agent, or by a third person who assumed to act in the interest of the one in whose behalf they were rendered, the authority of that person and the terms of the employment become important factors in determining the liability or the right of recovery. The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed. Es-

pecially in a case like the present, where there was no authority in the defendant's attorney to engage counsel at her expense, and where he had agreed with her to pay all the expenses of the litigation, will the law refuse to imply from her mere silence a promise to pay for the services rendered under such employment. In Price v. Hay, 132 Ill. 543, it was held that the acquiescence of a client in the appearance of an attorney and performance of services by him in the case is not legitimate evidence from which a jury may infer an implied contract between them to pay for such services, where the client has previously employed other counsel therefor at a fixed fee. Similar rulings have been made in Holmes v. Board of Trade, 81 Mo. 137; Young v. Crawford, *supra;* Savings Bank v. Benton, 2 Met. (Ky.) 240; Evans v. Mohr, 153 Ill. 561; Ennis v. Hultz, 46 Iowa 76." (*Porter v. Elizalde,* 125 Cal. 204, pp. 207, 208.)

See also:

Miller v. Ballerino, 135 Cal. 566, 57 Pac., page 1046;

Cormac v. Murphy, 58 Cal. App. 366, 208 Pac., page 360; also

90 A. L. R. 258 and Annotations commencing at page 265.

SECOND SPECIFICATION OF ERROR.

Even if the November 20, 1940, agreement had been effectually rescinded or superseded by the mimeographed form of February 1, 1945, it was error upon the Court's part to allow 12½% of the land value to Judge Preston, in addition to the 10% awarded to Messrs. Sallee and Clark. To be conservative, if the values given by the high

and the low appraisers were to be averaged, the value figure would be:

$$\$211,500.00+\$1,047,000.00=\$1,258,500.00=\frac{\$629,250.00}{2}$$

The attorneys' fees computed upon the averaged value would then be for Messrs. Sallee and Clark: $62,925.00; for Judge Preston, 98,636.25

Total Fees $161,561.25

Clearly this is an excessive fee to be allowed Judge Preston in view of the record. First it should be remembered that the bulk of the costs, including travel to San Francisco and Washington, D.C., were contributed by Lee Arenas or perhaps in part by other Indians.

EVIDENCE ON SECOND SPECIFICATION OF ERROR, TESTIMONY OF T. B. COSGROVE:

"Q. I say, you have read and familiarized yourself in a general way with the contents of the briefs which were filed in the Circuit Court of Appeals in connection with the appeal of Lee Arenas from the summary dismissal? A. Well, I will say yes, but permit me to say that when I examined the briefs I did not examine the briefs like a judge of the Circuit Court of Appeals would who would be called upon to write an opinion, because I knew the opinions had already been written and the case had been decided. I examined the briefs only for the purpose of determining what the point was that was presented; and then I examined the decisions of the court very carefully to see how the court had decided these issues of law and fact for the purpose of determining, not how the case should be decided, but the extent and the

character of skill required to present the matter anew to the Circuit Court of Appeals and to the Supreme Court. So if you have in mind the purpose for which I examined the briefs, the answer would be yes. (279)

Q. Well, did you notice any difference, any essential difference, in the points presented in the appeal brief in the Circuit Court of Appeals and the points presented in the petition for certiorari filed in the Supreme Court of the United States, the petition that was filed about October 29, 1943, that is the first petition for certiorari in the Arenas case? A. I noticed—I am not certain about dates; I do not carry dates in mind—*but I think that there isn't any fundamental or clearly ascertainable distinction in the points that were presented originally to the Circuit Court of Appeals and to the Supreme Court of the United States in the first appeal in the Arenas case.* The difference is in the manner in which they were presented and the success that accompanied the presentation of them. (280)" [Tr. pp. 76, 77.]

In reading this testimony it should be borne in mind that the appeal to the Circuit Court of Appeals had been completed before Judge Preston entered the case.

Testimony of Petitioner Clark:

"Q. Mr. Clark, in the report of the Arenas case decided by the Supreme Court, in 88 Law Ed. at pages 1373 and 1374, it is indicated in the reporter's notes of the briefs by both sides and of the appearances that, in addition to Judge Preston appearing and arguing the case, you also appeared and argued the case; is that correct? A. Yes; I did. We divided the case into two parts, Judge Preston opened the argument on the question of the statutory liability,

> I followed on the question of estoppel, and I presented the rebuttal argument at Judge Preston's request in relation to the entire case. That was my first and only appearance before that court." [Tr. pp. 115, 116.]

The record shows that thereafter Judge Preston and his associates spent two court days trying the case upon the merits in the District Court and one day in court in the Circuit Court of Appeals on the appeal. In addition the petitioners did, it appears, a substantial amount of work in preparation.

The decisions upon the value of legal services are so varied, depending upon the facts of each case, that it seems pointless to give citations here.

While the appellant Arenas does not concede that the Court could properly award any fees over and above the 10% limitation contained in the contract of employment of November 20, 1940, disregarding this for solely the sake of argument, the award of 12½% to Judge Preston is so excessive as to clearly constitute prejudicial error upon the part of the Court below.

The Courts, including the Appellate Courts, have the absolute discretion to fix attorneys' fees irrespective of what opinions may be given by lawyer-witnesses upon the alleged value of legal services rendered.

> *Estate of Duffill,* 188 Cal. 536, 206 Pac. 42;
> *Kendrick v. Gould,* 51 Cal. App. 712, 197 Pac. 681;
> *Kirk v. Culley,* 202 Cal. 501, 261 Pac. 994.

Conclusion.

It is respectfully submitted that in respects of the above assigned, the Trial Court committed prejudicial error and that the judgment should be set aside and reversed.

Dated: Los Angeles, May 2, 1949.

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